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**OFFICE OF PETITIONS**

In re Application of  
Carlone et al.  
Application No. 09/623,038  
Filed: 11/27/2000  
Attorney Docket No. 65446

DECISION ON PETITION

This is a decision on the petition filed November 20, 2006 (certificate of mailing dated November 14, 2006), to withdraw the holding of abandonment.

On October 7, 2005, the Office mailed a final Office action, which set a three-month shortened statutory period to reply. In the apparent absence of a timely reply, the Office mailed a Notice of Appeal on April 25, 2006.

In the present petition, applicants requested that the Office withdraw the holding of abandonment as stated in the Notice of Abandonment mailed April 25, 2006. Applicants averred that the Office issued the Notice of Abandonment in error because applicants filed a timely and proper reply to the final Office action of October 7, 2005. Applicants asserted that they filed a Notice of Appeal and a request for an extension of time for response within the third month, accompanied by a certificate of mailing dated April 7, 2006. In support of the assertion, applicants provided a copy of the return, date-stamped postcard acknowledging receipt of a Notice of Appeal (2 pages); a Request for Extension of Time (2 pages); a \$1020.00 fee; and a Certificate of Mailing dated April 7, 2006. Copies of these documents accompanied the petition.

Upon a review of the record, the examiner determined that a timely reply to the final Office action in the form of a Notice of Appeal and a three-month extension of time was timely received in the USPTO on April 14, 2006 (certificate of mailing dated April 7, 2006). Accordingly, on November 21, 2006, the Office, on behalf of the examiner, mailed a communication indicating that the holding of abandonment as communicated in the Notice of Abandonment of April 25, 2006, was withdrawn, and that the copy of the original reply submitted on April 14, 2006 (certificate of mailing dated April 7,

2006) had been made of record. Nevertheless, on November 30, 2006, the examiner mailed a Notice of Abandonment, indicating that the application was abandoned because the period to file a timely appeal brief (and fee) had expired.

### DISCUSSION

As indicated above, applicants established that they submitted a timely reply to the final Office action in the form of a Notice of Appeal and a three-month extension of time on April 14, 2006 (certificate of mailing dated April 7, 2006). Therefore, the two-month extendable period to file an appeal brief in compliance with 37 CFR 41.37, accompanied by the fee, began to run from April 14, 2006, the date of filing the notice of appeal. The Office notes that "37 CFR 41.37(a) does not permit the brief to be filed within the time allowed for reply to the action from which the appeal was taken even if such time is later." *MPEP 1205*. "Once appellant timely files a notice of appeal in compliance with 37 CFR 41.31, the time period for reply set forth in the last Office action is tolled and is no longer relevant for the time period for filing an appeal brief." *Id.* As applicants filed an extension of time within the fifth month on November 20, 2006 (certificate of mailing dated November 14, 2006), applicants were required to submit an appeal brief on or before November 14, 2006. In other words, applicants, themselves, started the running of the two-month extendable period to file an appeal brief based upon the date applicants submitted the Notice of Appeal with the USPTO. Unfortunately, the record reveals that applicants did not file an appeal brief on or before November 14, 2006.

### CONCLUSION

As no appeal brief was received in the USPTO, the application was properly held abandoned. Accordingly, the petition is **dismissed**. The application will remain in its abandoned state until applicants file a petition to revive the application accompanied by an appropriate reply and the petition fee.

Further correspondence with respect to this matter should be addressed as follows:

By mail:                   Mail Stop Petition  
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Telephone inquiries related to this decision should be directed to the undersigned at (571) 272-3211.

A handwritten signature in black ink, reading "C. T. Donnell". The signature is written in a cursive, flowing style.

Christina Tartera Donnell  
Senior Petitions Attorney  
Office of Petitions